

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	
ROY L. ALLEN, II)	Adversary Proceeding
(Chapter 7 Case <u>98-40838</u>))	Number <u>98-4176</u>
)	
<i>Debtor</i>)	
)	
)	
SUNTRUST BANK, SAVANNAH)	
N.A., as Assignee and/or Successor)	
of Trust Company of Georgia Bank)	
of Savannah, N.A.)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
ROY L. ALLEN, II)	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER

An involuntary petition under Chapter 7 was filed against Debtor on March 18, 1998. Plaintiff, SunTrust Bank, a creditor in Debtor's bankruptcy case, filed this adversary proceeding on August 11, 1998, seeking a determination that the debt owed to it

by Debtor is excepted from discharge. This Court has jurisdiction by virtue of 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(1). This matter came on for trial on May 20, 1999, at which time Plaintiff presented its evidence. Debtor did not appear either personally or through counsel. Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

In August, 1993, Roy Allen (hereinafter referred to as “Allen”) was an attorney licensed to practice law in the State of Georgia. Allen owned a piece of commercial property located at 311 East York Street, Savannah, Georgia (hereinafter “the Property”) which he used as a law office. In the summer of 1993, Allen requested that the predecessor of SunTrust Bank, Trust Company Bank of Savannah, N.A., (hereinafter referred to as “SunTrust”) refinance the Property. The funds loaned in conjunction with the refinance of the Property were to be used to satisfy the first mortgage on the Property as well as to satisfy an unsecured debt owed by Allen to SunTrust.

Prior to the refinance of the Property, Allen represented to SunTrust that 1) the existing lien on the Property held by Atlanta Life (hereinafter the “Atlanta Life lien”), would be paid with the loan proceeds; and 2) that SunTrust would become the first lien holder on the Property. If Allen had not made such representations, Sun Trust would not have refinanced the Property and loaned Allen \$150,000.00.

Allen requested that David Roberson, another local attorney, act as

settlement agent for the transaction. Allen understood that any funds received from SunTrust were supposed to be placed into the settlement agent's (Roberson's) trust account until the funds could be properly disbursed according to the directions of SunTrust. Specifically, Allen understood that funds received from SunTrust were supposed to be placed into the settlement agent's (Roberson's) trust account to pay, satisfy, and cancel the Atlanta Life lien.

As part of the refinancing of the property, SunTrust agreed to loan Allen \$150,000.00. Roberson was supposed to receive the proceed check of \$150,000.00 and make certain disbursements out of the loan proceeds. Specifically, Roberson was supposed to disburse the following amounts to the following entities out of the loan proceeds:

NAME OF PAYEE	AMOUNT	REASON FOR DISBURSEMENT
Atlanta Life	\$89,634.15	Pay off existing first mortgage
Trust Company Bank	\$61,100.00	Existing unsecured debt owed by Mr. Allen
Trust Company Bank	\$1,500.00	Origination fee
Exley Surveying	\$400.00	Survey of property
Yates Astro	\$75.00	
TOTAL	\$152,709.15	

The amount of disbursements was more than the \$150,000.00 loan proceeds. Mr. Allen was obligated to fund the difference and, at closing, Mr. Roberson should have collected from Allen an amount of at least \$2,709.15. Roberson, however, never collected those funds from Allen.

On or about August 6, 1993, a real estate closing was held on the refinance of the Property. At that time, Allen executed an HUD-1 settlement statement which specifically identified the amount of \$89,634.15 to be disbursed to Atlanta Life in order to pay and satisfy the Atlanta Life lien. Allen executed the HUD-1 settlement statement and stated that “to the best of his knowledge and belief, [the HUD-1 statement] is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction.”

Prior to executing the HUD-1 statement, Allen had wrongfully deposited the loan proceeds into his own trust account. After executing the HUD-1 statement, Allen did not disburse the funds that were earmarked to satisfy the Atlanta Life lien in accordance with the HUD-1 statement. Instead, Allen converted at least \$17,000 of the loan proceeds to his personal use without the permission or consent of SunTrust.

Additionally, after August 3, 1993, Allen continued to communicate with Atlanta Life, or its assignees, regarding the Atlanta Life Loan and Lien. Specifically, on or about November 8, 1993, three (3) months after the closing, Allen wrote to Atlanta Life requesting a payoff on the Atlanta Life Loan. On May 18, 1994, approximately nine (9) months after the closing, Allen sent to Atlanta Life a check in the amount of \$7,812.00 to bring the Atlanta Life loan current. On June 13, 1994, Allen issued a check out of his law firm account to Atlanta Life in the amount of \$9,809.92. Allen continued to make periodic payments on the Atlanta Life Loan until 1997. Ultimately he defaulted and SunTrust had to perform foreclosure proceedings on the Property as a second mortgage holder. SunTrust

would have had to pay the outstanding balance of the first mortgage but, SunTrust's title insurer purchased the first mortgage and released it to Sun Trust in exchange for an assignment of this claim. The amount of money required to pay off the first lien, plus interest and the cost of litigation is the debt which SunTrust seeks to have determined non-dischargeable in Allen's bankruptcy.¹ SunTrust's total loss amounts to \$64,132.19.

SunTrust contends that Allen (1) obtained money and a refinancing of credit by the use of false pretenses, false representations or actual fraud and (2) willfully and maliciously converted money to the injury of SunTrust. The obligation owed by Allen to SunTrust is therefore excepted from discharge.

CONCLUSIONS OF LAW

Plaintiff first contends that the amount of money required to purchase the first mortgage plus interest at the legal rate plus the costs of litigation, including reasonable attorneys' fees, should be declared non-dischargeable pursuant to 11 U.S.C. § 523(a)(6). Section 523(a)(6) provides:

[A] discharge under section 727 . . . of this title does not discharge an individual debtor from any debt for willful and malicious injury by the debtor to another entity or to the property of another entity.

A debt will only be nondischargeable if it results from a deliberate and intentional injury, not

¹ The benefit of any proceeds that might be ultimately obtained from this action will inure to the benefit of Sun Trust's insurer, First American Title Insurance Company ("First American"). First American has the right to pursue this claim in SunTrust's name pursuant to the title insurance policy.

merely a deliberate and intentional act that leads to injury. Kawaauhau v. Geiger, --- U.S. ---, 118 S.Ct. 874, 977, 140 L.Ed. 2d 90 (1998). Debts excepted from discharge under Section 523(a)(6) are in the category of “intentional torts,” which include conversion debts in bankruptcy. 118 S.Ct. at 978.

Plaintiffs also request relief pursuant to 11 U.S.C. § 523(a)(2), which states in pertinent part:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt--

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by--

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition;

(B) use of a statement in writing--

(I) that is materially false;

(ii) respecting the debtor’s or an insider’s financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive;

In conversations with bank officers, Debtor represented that the Atlanta Life loan would be paid off in relation to the refinance. In addition, Debtor executed a HUD-1 statement which listed the Atlanta Life loan as an item for disbursement. Finally, Debtor had

control over the loan proceeds and could have disbursed the monies in accordance with the HUD-1 statement; instead, Debtor intentionally converted at least \$17,000.00 of the loan proceeds to his own use without the consent of the Plaintiff. Debtor further failed and refused to pay off the Atlanta Life loan but instead made some monthly payments on that loan. When he defaulted in making monthly payments the misdeeds were discovered.

Based upon the above facts, I hold that Debtor's debt arises out of both a willful and malicious injury to plaintiff, and an extension of credit obtained by false pretenses, representations and fraud. SunTrust is entitled to a judgement declaring the principal debt nondischargeable. In addition, the Deed to Secure Debt entered into by Debtor allows for the award of costs of collection. If the contractual arrangement between parties provides for costs of collection being assessed against the debtor, a court should uphold such arrangement. TranSouth Financial Corp. of Florida v. Jennings, 931 F.2d 1505 (11th Cir. 1991). The Bankruptcy Code also allows for the award of collection costs in cases of bad faith and wrongful conduct. In re Smith, 91 B.R. 612, 614-15 (M.D. Fla.1988); In Re Marderosian, 186 B.R. 341, 346 (D.R.I. 1995). The debt in the amount of \$64,132.19² shall be excepted from Debtor's discharge pursuant to both 11 U.S.C. § 523(a)(6) and 11 U.S.C. § 523(a)(2).

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law IT IS

² Plaintiff stipulates that monies recovered in the amount of \$57,000.00 from third sources are to be offset against the total amount of expenses, \$121,132.19.

THE ORDER OF THIS COURT that the debt in the amount of \$64,132.19 shall be excepted from Debtor's discharge.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of July, 1999.